Supreme Court, U.S.
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No. 97-862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PAUL PAPAPANOS,

Petitioner,

vs.

LUFTHANSA GERMAN AIRLINES, etc., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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CORPORATE AFFILIATIONS

1. Deutsche Lufthansa A.G. doing business as Lufthansa German Airlines has no corporate parents, subsidiaries, or affiliates the shares of which are publicly traded in the United States.

2. Cargolux Airlines International, S.A. has no corporate parents, subsidiaries, or affiliates the shares of which are publicly traded in the United States.

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BRIEF IN OPPOSITION TO PETITION

Respondents, Lufthansa German Airlines ("Lufthansa") and Cargolux Airlines International ("Cargolux"), respectfully submit this brief in opposition to the petition for a writ of certiorari.

POINT I

THERE IS NO CONFLICT BETWEEN THE CIRCUITS

Petitioner asserts that the decision below conflicts with decisions of two other United States courts of appeals concerning the appropriate point or points in time to assess a party's status as to whether or not that party is an "agency or instrumentality of a foreign state," for purposes of removal jurisdiction, pursuant to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1441(d). Petitioner cites two groups of cases. The first has granted "foreign state" status where a defendant was a foreign state at the time the act complained of occurred ("Period A") but not at the time the complaint was filed ("Period B")--*General Elec. Corp. v. Grossman*, 991 F.2d 1376, 1380-82 (8th Cir.

1993); *Gould, Inc. v. The Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988), *cert. dismissed sub nom., Pechiney & Trefimetaux v. Gould, Inc.*, 503 U.S. 978 (1992). The second group has granted foreign state status to a party that was a foreign state at or after the time the complaint was filed, Period B, but not at the time that the act complained of occurred, Period A--*Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458, 1460 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985); *Callejo v. Bancomer, S.A., 764 F.2d 1101, 1106-1107 (5th Cir. 1985); Straub v. A P Green Inc.*, 38 F.3d 448, 451 (9th Cir. 1994).

There is no conflict between these groups of cases because no court which has granted foreign state status based on a party's status during Period A has ever stated that it would be inappropriate to grant foreign state status to a party based on its status during Period B. And conversely, no court granting foreign state status to a party that was a foreign state during Period B has ever stated that it would be inappropriate to grant foreign state status to a party based on its status during Period A.

As noted in *Cargill International, S.A. v. M-T Pavel Dybenko*, 991 F.2d 1012

1016 (2nd Cir. 1993):

> [T]he FSIA was enacted to address "the potential sensitivity of actions against foreign states." H.R.Rep. No. 1487, 94th Cong., 2d Sess. 32 (1996), *reprinted in 1996 U.S.C.C.A.N. 6604, 6631* ("House Report"). Thus, it aimed "to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation." *Id.* at 45, *reprinted in 1996 U.S.C.C.A.N. at 6634* (executive communication from Departments of State and Justice enclosing draft bill for consideration of the House).

As stated by this Court:

> The Act...clearly contemplates that such suits may be brought in either federal or state courts. However, "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area," H.R.Rep No. 94-1487, at 32, the Act guarantees foreign

> states the right to remove any civil action from a state court to a federal court, *id.* § 1441(d).

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 489 (1983).

Following the FSIA's policy of addressing the "potential sensitivity of actions against foreign states and the importance of developing a uniform body of law" explicitedly focused on removal, *id.*, the courts of appeals have applied foreign state status to parties that were foreign states at Period A, at Period B, or at both Periods A and B. While holding that the FSIA applies when foreign state status occurred at Period B, the Ninth Circuit emphasized the fact that both Periods were appropriate when it stated that the "reliance [of the party opposing foreign state status] on cases from other circuits [applying Period A] does not support his argument [that Period B is not appropriate]." *Straub* at 451. The court continued, "*Straub* has cited no precedent holding that a party that is a foreign state when the litigation commences [Period B] is not entitled to the protections of the FSIA. We have found none." *Id.* Nor have Petitioner or Respondents in the case at bar found any precedent holding that a party, that is a foreign state when the act

complained of occurred, Period A, is not entitled to the protections of the FSIA.

There is no conflict because the precedents all give effect to the public policy of the FSIA which is to give uniform treatment to foreign sovereigns who are involved in a lawsuit at either relevant time. This uniform treatment consists of having the case heard by a federal judge, who is part of one federal system, without a jury.

In sum, the courts have recognized that the policy of the FSIA, to address the potential sensitivity of actions against foreign states by developing a uniform body of federal law which guarantees a foreign state, among other things, the right to remove any civil action to a federal court, is best given effect by applying either Period.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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